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No. 83-240

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

LAWRENCE COUNTY AND THE LAWRENCE COUNTY COMMISSIONERS,

*Appellants,*

v.

LEAD-DEADWOOD SCHOOL DISTRICT NO. 40-1,

*Appellee.*

**On Appeal From The Supreme Court Of The State Of South Dakota**

## MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF NATIONAL ASSOCIATION OF COUNTIES, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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## MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

Pursuant to Rule 36.3 of the Rules of this Court, the National Association of Counties ("NACo"), fourteen state county associations and 77 individual counties (the "Counties")[1] respectfully move this Court for leave to file a brief as *amici curiae* in support of Appellants. Appellants Lawrence County and the Lawrence County Commissioners have consented to the filing of this brief. Appellee Lead-Deadwood School District No. 40-1 has refused consent to the filing of this brief by NACo and the Counties.

[1] A complete listing of the individual NACo member counties and non-member counties and state associations of counties joining in this motion are attached as Appendix B to brief of *amici*.

As noted in the "Interest of *Amici Curiae*", NACo's member counties,[2] as well as certain non-member counties, who have joined in this motion and brief, are "units of general local government" which receive funds from the federal government under the Payments In Lieu Of Taxes Act, 31 U.S.C. §§ 6901-07 ("PILT").[3] The importance of PILT payments to these counties is substantial. PILT provides that the payments under Section One of the Act go directly to local governments and are to be used by them for any governmental purpose. 31 U.S.C. § 6902. The South Dakota statute which is the subject of this appeal restricts that discretion by predetermining the governmental purposes for which the *amici* and other counties and local governments could expend PILT payments.

This case, therefore, presents issues of overwhelming national importance to *amici*—the constitutionality of a state law which purports to change the scheme of payments under PILT. This impacts the Counties' budgets, as the PILT funds are compensation for the loss of tax

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[2] NACo is the only national organization representing county governments in the United States. Through its membership urban, suburban and rural counties join together to build effective and responsive county government. The goals of the organization are to: improve county government; serve as the national spokesman for county government; act as a liaison between the nation's counties and other levels of government; and achieve public understanding of the role of counties in the federal system. NACo currently represents 1850 of the nations 3105 counties and, through them, about 204 million Americans, approximately ninety percent of the population of the United States.

[3] The Secretary of the Interior has determined that in most instances counties are the unit of general local government entitled to receive PILT funds. 43 C.F.R. § 1881.0-5(b)(1).



bases due to the presence of federal lands, as well as the continued and effective provision of local services to the federal lands and operation of the national PILT program. Any redirection or redistribution of PILT payments threatens the ability of *amici* to accomodate the budgetary problems associated with federal lands. Without the unrestricted use of the PILT payments, as directed in PILT and as made clear in PILT's legislative history, many of *amici* will face extraordinary budgetary and economic strain.

The decision of the Supreme Court of South Dakota could be used as authority for other states to legislatively misdirect their counties' PILT payments. *See, e.g.*, Ark. Stat. Ann. § 80-726. This would threaten a substantial and important federal program, compromise the counties' existence and disserve Congress' express purpose of compensating the units of local government closest to the federal lands and most sensitive to the costs and needs of the community embracing those lands.

The Supremacy Clause issues here rise in a unique situation. This is not a case where federal law suppresses or infringes on a state's or local government's rights. Congress here established a federal entitlement program which enhances—*without* restriction—local government operations. It is the challenged state law which attempts to restrict those operations and, therefore, to suppress those rights.

*Amici* firmly believe that the South Dakota statute is unconsitutional for conflicting with Congressional purpose as expressed in PILT's terms and legislative history. Only this Court can authoritatively resolve this issue and determine that neither the state legislatures nor any state agency or bureaucratic officers may interfere with

the PILT program. The participation by NACo and the Counties will be of benefit to the Court by insuring a presentation of the full range of issues involved and amplify the deleterious effect that upholding the South Dakota Supreme Court's decision would have on this nation's counties, the PILT program and the continued maintenance of this nation's public lands. To this end, NACo passed a resolution registering its support of Appellants and has received similar resolutions from many member and non-member counties, all seeking to participate in this appeal and support Appellants. *See* Appendices A and B to Brief of *Amici*. NACo's *American County Platform* also contains statements of basic policy and resolutions supporting the continued funding and full operation of the PILT program. *See* Appendix C to Brief of *Amici*.

It is therefore respectfully requested that NACo and the Counties be given leave to file the accompanying brief as *amici curiae* in support of Appellants.

Dated: June 11, 1984

Respectfully submitted,

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## BRIEF OF NATIONAL ASSOCIATION OF COUNTIES, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS.

The National Association of Counties ("NACo") and individual member and non-member counties and states' associations of counties (the "Counties") join in their support of Appellants and respectfully pray the Court reverse the decision of the Supreme Court of the State of South Dakota.

### INTEREST OF *AMICI*

This appeal seeks a determination of whether a state may legislatively redirect payments made to units of general local government, which for the most part are counties, under the Payments In Lieu Of Taxes Act, 31 U.S.C. §§ 6901-07 ("PILT"). The issues raised in this appeal are of vital importance to *amici*.

*Amici* Counties, including those that are members of NACo, all receive payments from the federal government under PILT.[4] *Amici's* interest and need in preserving these payments for their discretionary use, *i.e.*, for any governmental purpose, will be directly affected by the Court's action with respect to this appeal. It is they who will bear the substantial, direct and immediate impact of any alteration of the scheme of payments under PILT.[5]

It is *amici's* position that the attempt by the South Dakota legislature to redirect Appellants' PILT payments is unconstitutional under the Supremacy Clause of the United States Constitution. *Amici* also believe that the South Dakota Supreme Court committed substantial error in failing to properly analyze congressional purpose and intent when it upheld the challenged South Dakota statute. Congress' determination that the units of local government closest to the federal lands should receive and disburse PILT payments according to *their* needs without state interference is clearly stated in PILT and its legislative history. Unless this Court reverses the decision below and finds the South Dakota statute unconstitutional, the Counties stand to lose control of all or a portion of their PILT funds. Arkansas already has a statute which purports to redirect PILT payments and

[4] The Act specifically defines the recipients of PILT payments to be units of general local government which provide "general governmental services" and lists counties, *inter alia*, as examples. 31 U.S.C. § 6901(2). The Secretary of the Interior is obliged to determine the appropriate unit, which has been determined to be in most instances, counties. 43 C.F.R. § 1881.0-5(b)(1).

[5] PILT payments in 1983 were approximately $96 million to over 1700 counties in 49 states and the District of Columbia. *See* Appendix D.



which was recently challenged in *Altus-Denning School District No. 31* v. *Franklin County*, 568 F.Supp. 95 (W.D.Ark. 1983).[6]

The issue of the state's power to legislate with respect to PILT funds is, therefore, of vital interest to *amici*. NACo's basic philosophy and indeed formal resolutions with respect to public lands generally, is to support the full payment of PILT funds for the unimpeded distribution to the counties and to pursue legislation to that end. Appendix C. The participation by NACo and the counties, both committed to the unhampered and continued operation of PILT, will assure the presentation and briefing of the full range of issues before the Court. *Amici* will outline the practical aspects of the PILT program and the potentially disasterous effects its possible curtailment will have on units of local government throughout the country.

## SUMMARY OF ARGUMENT

PILT provides a necessary stream of payments to units of local government to compensate them for the costs and burdens of supporting tax-exempt federal lands within their boundaries. Congress directed these payments to the local governments closest to the lands, realizing: (1) that the associated costs and burdens would vary by category and location; and (2) that the states would not necessarily direct funds to the areas needing them most.

[6] Ark. Stat. Ann. § 80-26 sought to redistribute funds received on account of national forest lands to school districts. Although the court found the scheme void because the Secretary of the Interior's regulations excluded school districts, the court also reasoned that, to the extent the state statute conflicted with PILT's own terms, it was void under PILT as well. *Id.* 568 F.Supp. at 102.

Accordingly, Congress did not earmark or restrict the payments, but gave them to the local governments to be spent in *their* discretion.

The South Dakota statute which is the subject of the instant appeal purports to alter Congress' scheme and change the intended initial recipient and decision-maker with respect to the use of PILT funds. The South Dakota law's redirection conflicts with PILT's grant to the *initial* recipient, the unit of general local government, the right to determine the *ultimate* use of the funds. A state is without the power, under the Supremacy Clause, to amend PILT in this manner. Similarly, a state is without authority under PILT to pre-determine for local governments within the state which governmental purposes are appropriate for expenditures of PILT funds.

A fragile balance always exists among the various levels of government, the requirements for providing needed public services, and the funds necessary to carry out those functions. This is particularly true where the federal government itself, by the ownership and operation of public lands, creates the need for services to be provided by another level of government. With PILT, Congress specifically determined that the burdens created by the existence of federal lands are those which impact local government. Congress therefore created a reimbursement system which permits local governments to determine the services required by the existence of the federal lands, to determine which departments, agencies or units of local government should satisfy those needs, and to allocate and use federal funds in their sole discretion to partially recoup the losses otherwise incurred by these local governments. Unlike other schemes of federal payments, PILT has explicitly removed the state governments from participation in service or funding decisions.



Upholding South Dakota's statute, or a similar action of any state, would frustrate local needs and allocations, and would also frustrate the intent of Congress as well as the effectiveness of a program designed to support local governments in servicing legitimate federal interests. It is this unwarranted intrusion by state action which threatens the ability of local governments to respond to needs created by the federal government and, in fact, the viability of PILT itself.

## ARGUMENT

### I. PILT Provides A Comprehensive Scheme For Alleviating The Burdens On Local Governments Of Supporting Public Lands

The presence of federal or "public" lands within this country's local communities presents a patchwork quilt of benefits, problems and issues that often predominate over many other local concerns. The more common of these issues, as recognized in the PILT legislation, is that the land's presence removes from local government the predominant, and often the only, source of income—real property tax assessments. Other traditional tax sources—income, sales, excise, corporate and licensing—are generally reserved to the states and, although locally generated, are usually reapportioned or sent back to the local communities in part and by state-wide appropriation only.[7]

The Payment In Lieu Of Taxes Act was enacted in response to these problems. It is a rare and unique federal program directing funds to units of local government

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[7] This generalization does not of course apply to all units of local government in all of the states; some local governments do possess income or sales taxing power.

which most immediately experience the impact and problems associated with the presence of federal tax-exempt lands within their boundaries.[8] These lands demand a variety of services yet do not usually produce any income as they are tax-exempt.[9] PILT directs the funds, and most importantly their control, to the affected persons, those units of local government closest to federal lands.[10] Without local direction and control it is doubtful, indeed highly improbable, that the federal funds will ever reach the source of problems for which they were designed to compensate.

The presence of federal property and removal of property tax base also impacts local governments by the removal of lands from development and occupancy by any permanent residential population—frequently only a transient population is attracted. Where there is substantial federal land present, there is generally a smaller residential population. The practical political impact of a sparse residential population with a smaller voting population results in a softer voice in state capitals where the concerns understandably are to meet the needs of more

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[8] *See* S.Rep. No. 1262, 94th Cong., 2d Sess., *reprinted in* 1976 U.S.Code Cong. & Ad. News 5968 ("S.Rep. 1262"); H.R.Rep. No. 1106, 94th Cong., 2d Sess. (1976) ("H.R.Rep. 1106") Portions of these reports are reprinted in the Appendix to Appellants' Jurisdictional Statement ("Juris.St.App.").

[9] Some federal lands are income-producing and Congress shares portions of those revenues with local and state governments under various statutes. *See* 31 U.S.C. § 6903(a)(1). However, these funds are wholly inadequate to compensate for the costs of maintaining the *non* income-producing lands as well.

[10] Congress noted that the control should be in the hands of these local governments by directing that they are to be used by the local governments for "*any* governmental purpose." 31 U.S.C. § 6902.



vocal and populous constituencies. Those more vocal localities are oftentimes those with less federal lands. Yet the impact of problems generated by the presence of federal lands, as Congress has recognized, is most immediately felt within the local governmental unit. Most frequently, visitors are drawn to enjoy the federal property with the myriad of problems to local governments due to the public services that people require, and are entitled to expect, including police, fire, public health, judicial administration, water and other utilities, street and highway maintenance, and building inspection and control. In short, transient populations expect and require all the services that resident populations require (with the most apparent exception of schools) plus many more. Yet these transient populations frequently attracted by federal land do not figure in any state allocation of funds based on population, do not pay any property taxes, and as already mentioned, add no appreciable volume to the large chorus of voices demanding state government appropriations.

The corresponding benefits that population influx spawns are therefore more often funnelled to the state government. The substantial commercial activity and expenditures contributed by tourism, although sometimes made to local businesses, enhance the state's tax base in sales and income, while magnifying local costs but making no local tax contribution at all.[11]

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[11] In enacting PILT, Congress found that "[t]he intangible economic benefits to the local economy from tourist related activities in and adjacent to these lands do not usually accrue to the local taxing authority. Income and sales taxes are sources of funds for the State treasury, yet the local governments are the entities which must provide for law enforcement, road maintenance, hospitals, and other services directly and indirectly related to the activities on these lands." S.Rep. 1262 at 9; Juris. St. App. at 16a.

Certain categories of federal lands, such as wilderness, attract relatively fewer transients or visitors. Indeed, their presence may be designed to discourage or repel local development. While this impact may be of no benefit to local commerce (a detriment in itself) the federal presence may be fully dependent on local support or services for even a bare minimum of public accommodation.[12]

Thus impact may be relatively substantial and only realized or appreciated locally. Recognition of costs and benefits to the broad spectrum of local communities is embodied in Congress' extraordinarily prudent PILT legislation allocating funds to those units of local government denied tax funds, to offset or meet the burdens of the presence of federal lands, to be expended for *any* governmental purpose.

It is the unit of local government that best understands and appreciates the impact and is best equipped to respond to the problems if given control of the funds. Even if states were to recognize the local impact, they might be politically or legally inhibited from reallocating them to where the impact is most immediately felt. Indeed, Congress found when it enacted PILT, that prior revenue sharing provisions which directed some funds to local governments (and often earmarked for schools and roads) did not provide the needed compensation to local governments of maintaining even those federal lands which were income-producing (S.Rep. 1262, Juris.St.App. at 16a-17a):

[12] For example, one search and rescue operation instituted by Clackamas County, Oregon, in the Mt. Hood National Forest (PILT lands) cost $24,000. *See* testimony of Tim Schultz on behalf of NACo before the Subcommittee on Interior of the House Committee on Appropriations, February 15, 1983.



> Many of the revenue sharing provisions permit the States to make the decisions on how the funds will be distributed. In far too many States, the result has been that the funds are either kept at the State level and not distributed to local governments at all or are parcelled out in a manner which provides shares to local governments other than those in which the Federal lands are situated and where the impacts of the revenue and fee generated activities are felt . . .

Accordingly, the scheme envisioned by PILT is one of enhancing and encouraging local governmental operations. These considerations were paramount and are essential to effectuating Congress' intent in compensating the local communities for loss of their tax base and at the same time providing for the effective maintenance of these federal lands.

### II. The States' Legislative Redirection Of PILT Funds Is Void Under The Supremacy Clause

The Supremacy Clause of the U.S. Constitution confers upon the federal government broad power to preempt state or local governments from local regulation in many substantial areas affecting the most fundamental community activity. Pervasive regulation has extended to almost every aspect of personal concern to the exclusion of the states. From the federal postal service and national defense, to regulation of atomic energy, current federal programs have become the predominant government presence in every U.S. community.[13] The federal government also concurrently regulates conduct along

[13] *See, e.g.*, Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission, 461 U.S. ____, 103 S.Ct. 1713 (1983); Fidelity Federal Savings & Loan Association v. de la Cuesta, 458 U.S. 141 (1982); Jones v. Rath Packing Co., 430 U.S. 519 (1977).

with the states and local governments by issuing standards and guidelines for health care, agricultural support and plantings, advertising, working conditions, conditions of employment, telecommunications, home building and mortgages and, not least of all, taxes.

Understandably, the federal presence is felt all the more in communities where the local neighbor and landowner is the federal government. While many federal regulatory programs are resented as a source of encroachment on individual conduct, many are necessary in a nation of integrated commerce and national interest. Although the Supremacy Clause has often been invoked to impose a federal program and suppress a conflicting state interest or local program,[14] here it has ironically been invoked *not* to curtail or reduce local government *but* to protect and enhance it. The PILT program and its Supremacy Clause protection promotes local government by allowing those most immediately affected by the presence of federal lands to deal with the impact in the manner most suitable to them. This demonstrates an enlightened federal attitude in its recognition that many problems created by a federal presence are best resolved by units of *local* government—the government closest to the community and responsible for making the day-to-day decisions on the effective provision of governmental services to that community. In this instance the Supremacy Clause is not a doctrine of federal encroachment, but a protection against encroachment by the states.[15]

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[14] *See, e.g.*, Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979).

[15] *See, e.g.*, Hergenreter v. Hayden, 295 F.Supp. 251 (D.Kan. 1968); Shepheard v. Godwin, 280 F.Supp. 869 (E.D.Va. 1968). The potential deleterious effects of such encroachment here is magnified by the fact that one of *amici*, Otero County, New Mexico, has 1.5 million acres of entitlement lands within its boundaries and its PILT receipts amount to 77 percent of its general fund operating expenditures.



On occasion, a federal program is imposed with impersonal and unconcious bureaucratic efficiency and results in suppression of individual liberties. In contrast, and not infrequently, a state regulatory program is enacted with careful design to promote a particular interest or region with a corresponding diminution or suppression of competing interests and regions. Within a state, regional interests are often more sharply defined and felt than broader national sections. In such a political climate, pervasive state regulation or a strong central state government may invade or impact on individual conduct and freedom more than the impersonal federal programs.

The instant case is apparently such an example. The state government in South Dakota seeks to override the federal statute's conferrence upon local governments of the right to determine the appropriate expenditures of PILT funds.[16] The state statute would channel funds to the school and other special districts in contravention of express local control and determination of governmental use. This is in complete disregard of the purpose and basis for which the federal funds were appropriated—to offset the impact of the presence of federal lands within *local* governments' boundaries that do not provide a source of tax revenues. School support, while a laudable and indeed most appropriate governmental purpose, ordinarily

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[16] Congress found that restrictions on the use of funds created undue difficulty for the local governments. "It is only the most fortunate of local governments which is able to juggle its budget to make use of . . . earmarked funds in a manner which will accurately correspond to its community service and facility needs." S.Rep. No. 1262 at 9; Juris. St. App. 16a.

bears little relationship to federal land. As Appellants point out in their brief, public lands most frequently result in a reduction of school population and thus, if anything, a reduction of impact on this important element of public service.[17] Where there is an increase due to the presence of school children on the federal lands, the schools are provided for with Section Three PILT payments and other impact aid.[18] Direction of Section One funds to school districts means subsidizing communities and schools not impacted by the presence of federal lands. Such a reallocation undermines the federal program and, more importantly, it unfairly and unjustly allocates funds to the more populated regions and communities beyond the affected areas and thus further undermines the concept of local governance.

A persistent criticism of federal regulation is its overlapping inconsistency and sometimes conflicting nature with local needs and regulations. Because of the redirection and reallocation of PILT funds under the South Dakota statute challenged by Appellants, the state contributes to this overlapping and inconsistency. As the dissent reasoned in the court below, Congress "was directing the states to keep their noses out of the manner in which a county would distribute [PILT] funds." *Lead-Deadwood School District No. 40-1* v. *Lawrence County*, ____ S.D. ____, 334 N.W.2d 24, 27 (1983) (Juris. St. App. at 6a). South Dakota's redirection of PILT funds to school districts, in defiance of a stated different federal purpose and intent, is an invitation to eliminate a program de-

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[17] The South Dakota statute would require, however, that sixty percent of Appellants' PILT funds go directly to the school districts in Lawrence County.

[18] *See, e.g.*, 31 U.S.C. § 6904; 20 U.S.C. § 236.



signed to meet local needs and further the effectiveness of local government. South Dakota's restructuring of this important federal program is at best parochial and at worst unenlightened. It should not be allowed to stand.

## CONCLUSION

For the foregoing reasons, *amici* respectfully join in Appellants' request for this Court to reverse the decision of the South Dakota Supreme Court.

Dated: June 11, 1984

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